Via EFCS

Utility Consumers' Action Network
Comment To FCC WT Docket 05-194:

"Wireless Telecommunications Bureau Seeks Comment On Petition For Declaratory Ruling Filed By CTIA Regarding Whether Early Termination Fees Are "Rates Charged" Within 47 U.S.C. Section 332(c)(3)(A)"

WT DOCKET 05-194

August 4, 2005

INTRODUCTION

The Utility Consumers' Action Network (UCAN) welcomes this opportunity to address specific concerns and provide insight regarding the FCCs' review of the CTIA's proposal to include Early Termination Penalties(ETPs) in the definition of "rates charged" under Federal Communications Act Section 332(c)(3)(a). Moreover, UCAN desires that the FCC's decision to intimately involve itself in a discussion and review of Early Termination Penalties will result in consumer protections and competitive market benefits.

By way of re-introduction, UCAN is a non-profit consumer advocacy and education organization that has represented nearly 40,000 small residential consumers in San Diego, California since 1983. UCAN's mission involves constant monitoring and intervention in the evolving landscape of competitive wireless telephone markets on behalf of the interests of consumers in the State of California. Its research and advocacy on behalf of consumers has been recognized and cited often by the FCC.

Toward this end, UCAN offers a unique real-world perspective on how Early Termination Penalties are used in the market. UCAN's "Fraud Squad" complaint service attracts hundreds of wireless-related complaints each month from consumers around the nation. We regularly review the practical functioning and impact of Early Termination Penalties (ETPs) on customers. UCAN also actively participated in a three-year investigation into Cingular Wireless marketing practices conducted by the California Public Utilities Commission (I. 02-06-003) in which ETPs were prominently featured. Based upon this work, UCAN's perspective is an informed and literal examination of Early Termination Penalties and the relevant issues facing consumers and the marketplace.

UCAN RECOMMENDATION

UCAN recommends, on the basis of the analysis below, that the FCC exclude ETPs from the definition of “rates charged” under Federal Communications Act Section 332(c)(3)(a). By excluding ETPs, carriers will have additional incentives to minimize the use of the regressive and often inappropriately applied fee. Excluding ETPs from the definition of “rates charges” will also ensure that State contract and consumer protection laws are properly available for consumers to exercise their rights. UCAN’s comments are presented in the following order:

- The legal and economic justifications for excluding ETPs from “rates charged” are discussed, and the fallacies in CTIA’s arguments are specifically addressed.
- Specific case examples are offered, detailing the practical function of ETPs in the marketplace through descriptions of the ETPs impact on individual consumers.
- Discussion of the role of agent-imposed ETPs and the difficult regulatory issues they present.

I. EARLY TERMINATION PENALTIES ARE NOT “RATES CHARGED”

While the FCC has determined “rates charged” to include rate levels as well as rate structures, courts interpreting Federal Communications Act Section 332(c)(3)(a) have found that Section 332(c)(3)(a) is not so broad as to mean "anything that might touch upon [a wireless provider's] business" is a challenge to rates in the sense that an adverse ruling would increase "business expenses" that "would likely be passed on to customers as rate increases." <u>U.S. Cellular, 2000 WL 33915909, at *5;</u> <u>Cedar Rapids Cellular, 2000 WL 34030836, at *7;</u> see also <u>In re Wireless Consumers Alliance, Inc., 15 F.C.C.R. 17021, 2000 WL 1140570, at ¶¶ 9, 14-15 (F.C.C. August 3, 2000)</u>.

Even if it is accepted that there is federal preemption with regard to rate levels as well as rate structures, the case for ETPs being part of “rates charged” is thin. The inquiry, then, is whether ETPs can be said to be part of rate levels or rate structures.

Indeed, if Congress meant so, the language in 332(c)(3)(a) could have been “anything that affects rates” as opposed to “rates charged.” Also, if the language were this broad, there would not be a need for FCC decisions on record regarding the scope of “rates charged.” These decisions have made clear that there is not only room for state regulation, but that state regulation fills an important role in protecting consumers even where there could be an effect on rates, such as regulations regarding disclosure of information regarding rates and rate structures. In re Southwestern Bell Mobile Sys., Inc., 14 F.C.C.R. 19898, 1999 WL 1062835, at ¶ 23 (F.C.C. November 18, 1999). In Southwestern, the FCC observed that state law claims relating to the "disclosure of rates and rate practices are not generally preempted under Section 332.”

The CTIA has not given valid economic justifications for preempting state contract and consumer protection laws. First, the CTIA claims, incorrectly, that somehow ETPs have “reduced economic barriers for younger and lower income wireless subscribers.” These groups are often consumers with either 1) little or no credit history *or* 2) Poor credit history. UCAN’s experience with these customers is that they are forced to pay dramatically more up front than any other group to get wireless service. Cellular telephone companies, rather than relying on the ETP to cover their costs as claimed, require a substantial deposit from consumers with little or poor credit. Deposits can often amount to the entire cost of these subscribers’ contracts, in an effort to protect wireless companies from any risk associated with these consumers. These deposits are cashed by the Cellular Telephone Company immediately, creating a huge barrier to obtain service for consumers with little or poor credit. To say that ETPs lower the barriers to entry for those customers with little or poor credit simply flies in the face of actual practice by member CTIA companies.

Indeed, an ETP is an additional penalty, unrelated to rates, whose main function in the marketplace is to trap consumers. The ETP is rarely discussed by the companies’ agents with customers at initial sale. Subsequently, when a customer experiences a degradation in service or other breach in the contract by a cell phone company, customers are often told they have no other way to escape the contract with the cell phone company other than to pay the ETP. Consumers often believe they must comply and pay the fee, or retain the cell phone company despite its failure to provide service. In some circumstances, to avoid an ETP, consumers have maintained multiple cell phone contracts just to have working cell phone service(see Anderson case below) State contract and consumer protection laws must be available for consumers to exercise their rights, thereby diminishing consumer traps that stagnate the market. Taking away state protections from consumers, therefore, not only undermines consumers' ability to exercise their rights, but reduces fluidity in the cell phone service marketplace. These are *real* customers, being trapped into paying hundreds of dollars in penalties per phone on service that has failed them. It is easy money for cell phone companies but has consequences in undermining a properly functioning market.

Another question CTIA fails to address is how ETPs can be claimed to be part of "rates charged" when ETPs are fixed no matter when they are assessed to a customer. Thus, take the case of two similarly situated customers with 1-year cell phone contracts at $49.99/month. If customer 1 terminates in month 2, they are charged an ETP of $250. If customer 2 terminates in month 11, they are charged an ETP of $250. CTIA claims ETPs allow cell phone companies to spread out up front costs of acquiring customers, etc. If ETPs were truly intimately related to rate structure, they would be on a sliding scale, diminishing over time. Customer 1 has only paid ~49.99 for one full month of service plus activation fee, yet pays the same $250 ETP as Customer 2, who has paid at least ~$550 for 11 months of service plus activation to the cell phone company. Certainly Customer 2 has made up a great deal more of this up front cost then customer 1, yet this is not reflected in the ETP.

Finally, the CTIA fails to acknowledge that ETPs are not only charged by wireless carriers but also by their agents and independent wireless agents. In fact, many of the most egregious abuses are by these agents who fall outside the jurisdiction of the FCC – but WITHIN the jurisdiction of state consumer laws. The most serious problems with ETPs involve interaction and cumulative impact of *both* the carriers' ETPs and the agents' ETPs. When taken together, they effectively punish customers who choose to change service providers. The CTIA proposal would only address one-half of the formula.

As stated above, UCAN has documented numerous examples of where the ETP often serves the function of a consumer trap in practice. Questions and complaints regarding inadequate service are met with the prospect of the ETP(usually $175-250 per phone), in an attempt to either 1) force the consumer to remain in the contract despite inadequate service OR 2) to gouge additional monies out of a terminating customer. And where customers have legitimate bases for changing service providers (e.g. marked deterioration of service), the ETPs prevent them from exercising that right.

The following discusses examples of the function performed by state contract and consumer protection laws, as well as the real world impact of ETPs on consumers of cellular telephone service.

II. REAL-LIFE EXAMPLES OF EARLY TERMINATION PENALTY ABUSES

These case studies are drawn from UCAN documentation of the business practices of wireless providers, particularly their practices of using Early Termination Penalties, and the ways in which the use of these penalties violates state contract and consumer protection laws. Individual, real case examples are presented, and the need to preserve state law protections for consumers is clear.

Allowing Early Termination Penalties to be included under the 332(c)(3)(a) "rates charged" definition would result in wiping out state contract and consumer protection laws designed to protect consumers from a variety of misrepresentations and unfair business practices. Examples of the types of provisions which would be pre-empted by unduly stretching the definition of "rates charged" are found in the California Civil Code. While California Civil Code section 1770 prohibits unconscionable consumer contracts, the California

Civil Code section 1671 addresses why termination penalties are illegal and thus unconscionable.

Here are specific examples of complaints detailing how wireless providers use ETPs in violation of California state law limiting liquidated damages. Many of these cases was documented in the CPUC's I.02-06-003 investigation into Cingular; those customers were subjected to cross-examination by Cingular. Thus, the facts are not disputed. The violations, as seen by the case examples that follow, are happening across the wireless industry.

UCAN maintains that under section 1671, any fixed or liquidated damage provision is presumptively *void* in any contract entered into "primarily for the party's personal, family, or household purposes" (sec. 1671(c)). Liquidated damage provision are only permitted in consumer contracts if:

> [T]he parties to such a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage. (sec 1671(d)).

So carriers and their agents can only impose a termination fee in a consumer contract if both the amount of damage is impracticable to ascertain AND that such an amount "must represent a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained" *Garrett v. Coast and Southern Sav. & L. Assn.* (1973) 9 Cal. 3d 731, 739.

Here, it is certainly debatable whether the consumers "agreed" to anything, since there is never a negotiation over the amount of the termination penalty. It is presented on a take it or leave it basis by carriers and their agents and is the same regardless of which phone or calling plan is purchased. Regardless, carriers and their agents would fail on the second prong of the test. Although discussed in detail below, the agent loses no commission from a consumer terminating early, since the agent is required to sell to a customer who will stay around through the commission vesting period in order to have *earned* its commission. It cannot lose what it has not earned. Agents do not earn a commission from the carrier simply for getting someone to sign on the dotted line. At best the agent has lost some costs relating to the phone, which is a readily fixable cost, not “impracticable or extremely difficult to fix”.[1]

As noted in *Better Food Markets, Inc. v. American District Telegraph Co*, (1953) 40 Cal. 2d 179, 185-186, “except on admitted facts this is generally a question to be resolved by the tried or fact . . . [t]he burden is on the party seeking to rely on a liquidated damage provision in a contract to plead and prove facts showing impracticability” (of fixing damages). As to agents’ other costs – the courts have ruled that simple administrative overhead is not properly recouped under a liquidated damages provision. *Beasly v. Wells Fargo Bank* (1991) 235 Cal. App. 3d 1383, 1404.

1. *Pamela Andersen*

Ms. Andersen’s service was so inadequate that she had to resort to subscribing for service from another company and stopped using her Cingular phone even while still under contract with Cingular. Cingular blamed Ms. Andersen’s problems on her phone, but then indicated that since the phone did work enough for her to use around 250 minutes a month, they did not waive her early termination penalty (ETP). Apparently Cingular believes she was provided with adequate service and that she received the full service for which she paid.

Ms. Andersen’s service was so inadequate that she had to resort to subscribing for service from another company and stopped using her Cingular phone even while still under contract with Cingular. *For three months, she had both for her new phone and her Cingular phone.* She states that she didn’t cancel with Cingular because it refused to waive the ETP. Her new phone did get coverage through the Del Mar area- the exact place her Cingular phone would not function. In fact, with her new phone, she is able to use about 40% more minutes per month since she now has coverage in areas where she needs it.

[1] Customers routinely pay a discounted amount or nothing for a phone that the agent does buy at wholesale prices. However, since the agent routinely gets little or no revenue from the phone, “damage” sustained is minimal or non-existent, since there is no lost retail phone sale. And the agent can get the used phone back to minimize damages.

Cingular claimed it did not "intend" to mislead its customers when it gave information about planned cell sites. Apparently, Cingular posited that disclosure of planned cell sites cannot be misleading to customers. However, when reviewing the customer testimony in aggregate, we see a pattern of the company using this disclosure in a deceptive manner.

Like so many of the other declarants, Ms. Andersen stated that when she called Cingular with a coverage complaint, she was told that coverage improvements would come soon and she should stay with the company. Cingular's recently produced customer records to UCAN which confirm Ms. Anderson's contacts with the company. They show she discussed network issues with customer service on December 21, 2001 and January 29, 2002. Ms. Andersen remained on the Cingular network through May 2002 and reported no improvement. Cingular could not offer any rebuttal of the facts asserted by Ms. Andersen or even demonstrate what antenna upgrade projects were underway or completed in the Del Mar area. From the best that UCAN can determine, the promised upgrades never occurred. As this kind of story is repeated numerous times by consumers, it would appear that the problem is far greater than "results just take a little longer than the customer had anticipated".

2. Toya Reece

Here, the wireless provider, Cingular, again blamed Ms. Reece's problems on equipment, but Ms. Reece testified that the problems with coverage at her home were the same both with her old phone and her new phone- so it does not appear that equipment was the problem. Ms. Reece was, at one time, a happy customer, but reported a service degradation in early 2001; which corresponds with the time that Cingular switched over from Pacific Bell.

Ms. Reece's case is very instructive on the matter of early termination penalties. She was a victim of *service degradation*. The company convinced her that the problem was with her handset and she purchased a new phone, along with a two-year commitment. Cingular neglected to address Ms. Reece's statement following the company's effort to renew her commitment, which read in part:

> "I am very angry because Cingular scammed me into entering into a new contract based upon the false promise that my service quality would improve drastically. If anything my service quality has deteriorated with the new Cingular telephone."

Ms. Reece sought to be released from the "crooked" contract. Cingular refused to release her from the contract and used the early termination penalty relating to the second, new phone to keep her subscribed. Ms. Reece's case directly contradicted the representations to the California Public Utilities Commission by Cingular that all customers who complained of network problems would "be made whole".

3. Noori Townsend

Ms. Townsend's wireless provider, Cingular, seemed to want to believe Ms. Townsend had only billing problems. However, Ms. Townsend stated she has difficulty with coverage in Montecito, and that the phone became increasingly useless to her, since she could not rely on it to get calls. Unlike other cases brought by UCAN before the CPUC, Cingular conspicuously neglected to provide phone bills to rebut Ms. Townsend's claim that she was unable to regularly use the phone. Importantly, Ms. Townsend stated: "I would have cancelled service long before May if it had not been for the outrageous early termination fee that Cingular imposes on its customers. I have since switched to another wireless service provider." This is another example of how the ETP keeps a customer enrolled despite inadequate service.

4. Virginia Vogel

Ms. Vogel's wireless provider, Cingular, made much of the fact that Ms. Vogel had coverage problems at home with wireless providers other than Cingular. Thus, Cingular's defense appeared to be that its coverage was no worse or better than competitors. However, it ignores Ms. Vogel's rather vivid depiction of the huge gaps in Cingular's coverage near her East Bay home:

> [W]ith other carriers, as I drove down my hill, I could eventually pick up coverage. You can see the signal bar light up on the phone screen. But with Cingular, we drove down our hill. We drove all the way down Park Boulevard. We crossed Highway 13. We drove further down Park Boulevard. We crossed Highway 580. We drove nearly to Lake Merritt before we picked up any other coverage from Cingular. That was a huge area. I mean this is a couple of miles with no coverage.

Moreover, Cingular failed to rebut the fact that Ms. Vogel had been given reasons to believe that Cingular's coverage would be better than that offered by competitors. "[I]n the store in Montclair that we visited there was a map on the wall which showed the coverage for Cingular, and it clearly showed, you know, an enormous portion of the greater San Francisco Bay Area as being in their coverage zone."

Ms. Vogel's case offers another example of how the early termination penalty is used as a coercive tool to keep customers enrolled despite Cingular's inadequate service. Ms. Vogel paid for the last few months of service- April to July, because "it's cheaper to keep paying" for service at $80 per month than $450 to terminate.

Here there was a clear pattern of Cingular's CSRs making inaccurate representations as a means of keeping subscribers enrolled. Cingular failed to acknowledge its own revealing document in which Ms. Vogel recounts how Cingular CSRs made inaccurate representation to Ms. Vogel about coverage improvements, A CSR notes about her November 30, 2001 call:

> Customer's wife called. . . . was upset about the level of coverage in her area of Oakland. Informed and educated customer as to the level of coverage and explained that 10 more cell cites will be going in the Oakland area and this information was obtained through BTS report. I explained due to this coverage should improve in her area. Customer informed me that after 60 days if her coverage did not improve she would call me back directly and demand I cancel her service without. (sic)

However, as of April 2002, five months later, when she did cancel, coverage had not improved. Of course, had she cancelled in November 2001, she would have been required to pay $450 in cancellation penalties so she was economically prohibited from canceling.

5. Mark Nadell

Mr. Nadell and his family had an ATT Wireless family plan that they were sold on the basis of free mobile-to-mobile minutes between family members. There was no mention of a specific service area the plan would work in other than our general geographic area. Soon, they found out that some of their mobile-to-mobile calls in their town (Truckee) are free, and others count toward minutes, on the basis of simply which tower the phone is accessing within the town's confines. When they learned of this billing problem, they wanted to switch to a different company, but were told that termination fees of $175 per line would apply while our contract is current.

So Mr. Nadell's family's mobile-to-mobile plan only worked with specific towers in their town, sometimes charging user minutes, sometimes not. The difficulty had to do with the location of the town on the border of CA and NV. The Nadells were prevented from changing phone companies and using most of their Mobile to Mobile calls, despite the fact that ATT's local agents originally represented to the Nadells that their mobile-to-mobile plan would function in their hometown.

6. Ashley Praytor

Ashley Praytor presented UCAN with a recurring theme amongst cell phone users, particularly those involved with the Cingular/AT&T merger and possessing TDMA rather than GSM phones. Ms. Praytor complained that her phones no longer worked where primarily used. Ms. Praytor asked for 2 new phones(GSM) at her own expense, Cingular refused. Cingular refuses to let her terminate early without ETF of $175 for each phone (total $350), thus trapping her in the cell phone contract without receiving phone service.

7. **Toccara Horsey**

The Cingular store told Ms. Horsey, a former AT&T customer, that she had to transfer to Cingular from AT&T because they did not have any more AT&T(TDMA) phones. Her obligations in the AT&T contract remained, with new obligations to Cingular (she was not told this at the store). Realizing this a few weeks into her Cingular contract, she attempted to get out of the Cingular contract. Cingular charged her early termination fees despite telling her she owed nothing on the phone. The ETF, then, is used to trap consumers who have been misled into renewing their contracts when the customer believes they are simply upgrading phones or other services.

8. **Jan Wilberding**

Ms. Wilberding had Sprint PCS service and waited until her contract was completed and she was assured she had the ability to keep her old wireless number. Her contract had expired in October 2004 when she called Sprint and discontinued her wireless service with them. On the November invoice from Sprint they billed her a charge of $150.00 for an Early Termination Fee. Her contract had expired and she did not owe this fee. She tried to resolve this issue with Sprint, and they proceeded to send the bill to a collection agency. The collection agency representative told Ms. Wilberding that her contract was dated February 1, 2000, and automatically rolled over into a yearly contract upon completion. This statement was, in fact, false, and Ms. Wilberding had the real contract, dated October 2001, in hand, which provided no automatic yearly renewal, and clearly stated it was for a one year period. In June 2003, Ms. Wilberding decided to stay with Sprint for one year to try the Free and Clear plan. This agreement was made with Sprint representatives over the phone. Therefore when she cancelled her contract with Sprint in October 2004, Ms. Wilberding's contractual obligations had been fulfilled. In her dispute with Sprint, Sprint representatives themselves admitted that Ms. Wilberding had not changed anything after the agreement in June 2003 to begin a one year Free and Clear plan. Regardless, Sprint attempted to trap Ms. Wilberding by making false demands that Ms. Wilberding pay an ETP for obligations she never had. This is a common practice by wireless carriers, that of attempting to trap customers by renewing customers without notice, and then coercing them into completing the contract by levying an ETP when the customer attempts to migrate from the wireless provider.

9. Kevin Grohoske

Mr. Grohoske had a contract with Verizon Wireless that was set to expire August 12, 2004. He decided that once this contract expired he would move his service to T-Mobile to try to save money. According to all the websites and information he read regarding porting your number to a new carrier, it was recommended that you keep your current account active so you can port you number. So prior to the expiration date he purchased T-Mobile service and ported his number to T-Mobile. At no point did he notify Verizon that he would be cancelling his contract nor did he have any intention of doing so until the terms expired. He subsequently received a notice from Verizon that they had cancelled his account and were charging him $175 per line for early termination fees. He never had any intention of terminating this contract early. He intended to pay out his service charges until the contract expired with no number attached to the account.

Indeed, at the time he signed his contract there was no number portability, and he claims he did not agree to any terms that said anything to the effect of "if you transfer you number you are canceling the contract." Verizon claimed a $350 ETP from Mr. Grohoske despite the fact he never explicitly cancelled the contract and he wished to pay out the final months of his contract instead of incurring an ETP.

10. Carla P. Reyes

Ms. Reyes claims that when she signed up for service with Verizon, she specifically told the Manager of the store that she was switching from Sprint to Verizon specifically for text messaging capability to the Philippines. She signed up for the bundled plan, which to her knowledge, and according to Verizon materials she had examined, did not exclude international text messaging. Upon receipt of her first statement was she made aware of the additional charge for international text messaging. She complained at the Grossmont Store where she purchased her phone and signed up for service, and even spoke to the Manager who pretended he remembered why she switched over to Verizon. She actually wanted and requested to cancel service without paying the Early Termination Fee but they would not waive it. Otherwise, she asked for a waiver for free international text messaging as promised to her initially. Instead, Verizon said they could only offer her only the first month fees waived plus a $50 credit from her visit.

Consumers such as Ms. Reyes are being lured in contracts by wireless companies and their agents by false promises and exaggerated claims regarding the products. Despite minimal credits back to customers such as Ms. Reyes which function as attempted payoffs, the company has still reneged on initial commitments, and uses the ETP to hold consumers like Ms. Reyes in contracts where the services fail those consumers. Indeed, for a small credit, Verizon has trapped these customers into years long commitments worth many hundreds/thousands of dollars to the company, while failing to provide services.

III. AGENT IMPOSED ETPs CREATE DIFFICULT REGULATORY ISSUES

Agent-imposed ETPs are a major ingredient in the nasty brew of ETPs cooked up by the carriers. In I. 02-06-003, UCAN made a rather in-depth showing of how agent ETPs worked together with the carrier ETPs to form a significant obstacle for customers attempting to assert their rights. It was the fundamental unfairness and impropriety of this policy that compounded all the other problems from which Cingular customers suffered.

The problems raised by agent-imposed ETPs present a difficult regulatory question, and provide another justification for not including ETPs in the definition of “rates charged.” Indeed the agent-imposed ETPs are not under the jurisdiction of the FCC, and therefore state regulations apply. If CTIA’s proposal were adopted, wireless provider ETPs would be removed from state regulation, leaving a confusing and inadequate system of enforcement and remedy for customers challenging unlawful ETPs. And any restrictions imposed by the FCC in regards to carrier ETPs could be circumvented by agents – all who fall outside of the scope of the FCC’s jurisdiction.

Cingular’s early termination penalty, especially when combined with the agent penalty, proved to be an incredibly effective means of keeping people enrolled in Cingular’s service. By rising as high as $550 per phone, these penalties reached the level of being unconscionable. Although Cingular claims it could not control the termination penalties of its agents, it certainly benefited from them. Agents made a practice of tacking on additional termination penalties to the $150 penalty established by Cingular. These additional penalties were not disclosed in Cingular ads nor does it seem they were disclosed in Cingular’s agent created ads.

UCAN identified numerous cases where customers kept their Cingular service only because of the compounding nature of the Cingular penalty and the often pricier agent-imposed termination penalty -- penalties not made known in any Cingular advertisement. Cingular was able to generate monthly revenue it would otherwise not have due to the coercive effect of the agent penalty. This dilemma is exemplified by the testimony of Customer Brian Whelan, who stated: ”I want to cancel the phones and, if I am forced to, I would pay Cingular’s termination fee, which would be $300 (for his two phones). I don’t believe I should pay this, but I would to avoid damaging my credit. However, until October 27th I am subject to a $400 per phone termination fee ($800) from Cingular’s retailer- The Mobile Solution. Since canceling now would cost $1100, I am going to keep paying for inadequate Cingular service.”

Perhaps most egregious is the example of Roberta Green. She first called Cingular exactly two weeks after starting service. She stated that she could not make any calls in the first two weeks. No offer was made to waive her termination fee. However, she persisted. By the end of the month, she was able to get Cingular to agree to cancel without penalty, so she cancelled service. However, she then found out she had to pay the agent termination fee. She actually had to call back to Cingular and reactivate her phone to avoid this extra fee. Cingular did permit her to cancel at the six-month point, after it collected six more months of charges than it would have but for its agent's fee.

A similar story was told by Mary Dickenson. She bought two phones after being promised coverage in parts of eastern California. After her complaints, she was able to get Cingular to waive the termination fee on one of the two phones. Still, she would have to pay $950 to cancel the two phones- $150 to Cingular, $400 per phone to the agent. She decided not to cancel and kept the phone until the contract ran out.

By failing to exercise control over these additional termination penalties Cingular also created an incentive for its agents to commit fraud. Cingular has pointed out that its own commissions are paid to agents on a delayed basis. It claims that this is a means by which Cingular *prevents* fraud by agents. However, by permitting agents to charge secondary termination fees, there was effectively no fraud prevention at all. Agents could get paid by Cingular if the customer stayed for the commission vesting period, or the agent could get paid by the customers' termination penalty if the customer left before commission vesting period.

This arrangement creates an intolerable situation where the agent has only a minimal disincentive against misrepresentation of Cingular's coverage and service abilities in order to get the customer enrolled. Where the agent can impose a supplemental termination penalty, that agent is assured a substantial income even if the customer cancels the contract right away, after learning the agent lied about coverage. Once the customer signs on the dotted line, the agent will either get Cingular's commission, or reap revenues from its own penalty where the customer cancels early. Cingular's claimed strategy to prevent fraud by creating a vesting period was rendered moot. The supplemental termination penalties are the agents' protection against the vesting limitation.

As the CPUC found in Decision 04-09-062 dated September 23, 2004:

"The evidence establishes that at least as early as January 1, 2000 and continuing until May 1, 2002, when Cingular Wireless (Cingular) implemented a new, 15-day refund/return policy, its corporate policy and practice in California did not allow any "grace period" or trial of its wireless service. Furthermore, Cingular's corporate policy prohibited early termination of wireless service contracts unless the customer paid an early termination fee (ETF) of $150. Some Cingular agents imposed an additional ETF of as much as $400, which increased the total ETF to as much as $550." (Decision, p 2)

"Prior to May 1, 2002, the effective date of Cingular's new refund/return policy, agents and dealers sometimes charged customers an additional ETF. Sample contracts in the record incorporate agent/dealer ETFs of as much as $400. Garver's rebuttal testimony states, "[T]he contractual relationship between Cingular and its agents/dealers leaves them free to sell wireless equipment on their own account, at a price which they choose and on terms and condition which they establish." (Ex. 406, p. 4.) If the customer cancels service before the vesting of the activation commission, which Cingular pays agents/dealers for each new customer, … in many instances, the agent/dealer would lose its investment in the phone because they often resell the phones to customers at a significant discount from the price paid by the agent/dealer. The fee for cancellation for the equipment contract, was, in all likelihood, a means for the agent/dealer to recoup part of those losses. (*Id*. at p. 7.)
Thus, Garver's rebuttal testimony purports to focus, among other things "on the limited degree of business control" which Cingular has in its relationships with its agents and dealers. (*Id*. at p. 1.) However, review of Cingular's "Pro Forma Authorized Agency Agreement," attached to Garver's rebuttal testimony, indicates that Cingular holds a great deal of control over them. The agreement, prepared by Cingular and marked proprietary, expressly provides that the signatory owes Cingular "the fiduciary and other obligations of an agent to its principal" with respect to the selling of the "Authorized Cingular Services." (*Id*., Attach. 1.) Cingular clearly chooses to exercise control in certain areas. For example, the agreement requires the signatory to provide Cingular with copies of any proposed marketing and advertising materials and to obtain advance written approval to use them. Other indicia of control include various compensation terms, such as the activation commission and advertising reimbursement, described in Section 5.3 of today's decision. Cingular also sets activation quotas for agents and dealers. Most tellingly, once Cingular determined to implement its new ETF policy, effective May 1, 2002, it required agents and dealers to execute an "Amendment to Agency Agreement Re Phone Return Policy," which requires such entities to honor the new policy as of that date." (Decision p. 26-27)

As the regulators recognized, the agent-imposed ETPs bring a benefit to the carrier, yet fall outside the scope of FCC jurisdiction. UCAN submits that state authority over ETP practices allow regulators to address both the carriers and their agents' practices and abuses.

Respectfully submitted, Dated: August 5, 2005

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